

**Before the
Federal Trade Commission
Washington, D.C. 20580**

**Telemarketing Rulemaking
User Fee Comment
FTC File No. R411001**

Comments of the Tennessee Regulatory Authority

The Tennessee Regulatory Authority ("Authority" or "TRA") files these comments with the Federal Trade Commission ("FTC") in response to the Notice of Proposed Rulemaking to amend the FTC's Telemarketing Sales Rule to add a new section, 16 CFR § 310.9. The TRA will focus its comments on the proposed funding mechanism. Specifically, our comments will address: 1) the reasonableness of the FTC's projections on the cost of a national do not call registry, 2) the negative effect such a federal funding mechanism is likely to have on state do not call programs, and 3) an alternative funding mechanism that would compliment rather than compete with state programs.

The FTC cost projections for a National Do Not Call Registry are too low.

The TRA applauds the past efforts of Congress and the FTC in the passage and implementation of legislation including the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "the Act") 15 USCA § 6101 *et seq.* to protect consumers against telemarketing fraud. Twenty-six (26) states have also been active in passing legislation that addresses telemarketing abuses.¹ Evidence exists in those states that have enacted do not call registries that consumers are being protected and unwanted

¹ Council of State Governments. May 2002. A Review of Southern States' No-Call Registries. Atlanta, GA: *Regional Resources*.

telemarketing calls are being significantly reduced.² Based on Tennessee's two (2) year experience of operating a register, the TRA questions the FTC's estimated cost of \$5 million to implement and operate a national do not call registry for the first year of operations. The FTC should also consider the ancillary expenses of operating a do not call registry. Two likely expenses are the cost of investigating consumer complaints and enforcement activities. Since the Tennessee program was initiated in August of 2000, the TRA has investigated 1,553 telemarketing complaints and taken enforcement action against 16 telemarketing companies for violations of state law. The FTC can expect a substantially larger number of such activities if a national registry is adopted. The cost of these activities must be factored into the overall cost of the program. As explained below, the TRA asserts that a more realistic cost estimate for the first year of operation could be as high as \$45,000,000.

The FTC bases its estimated enrollment in a national registry on the historical enrollment data existing in state do not call programs. The FTC projects ultimately a national do not call register may contain approximately 60 million telephone numbers. The TRA agrees that to reach this projected enrollment number will likely take several years. Nevertheless, due to the popularity of similar state programs, the FTC should be prepared to register large numbers of consumers during the first year of operations. Based on the Tennessee experience during the first year of its do not call program, the FTC is likely to see enrollment figures in the 45 million range.³ How will the FTC handle such a large volume of calls by consumers? The FTC has appropriately concluded, as did the TRA, that such large call volumes generated by consumers to

² See TRA comments in NPR R411001 filed on March 28, 2002.

register will require contracting out this process. The TRA has determined that the average cost per consumer to call in to a toll-free interactive number to register is approximately \$1.00. What is the FTC's cost per enrollee for the first year? Assuming that the \$5,000,000 budget for the first year of the proposed national do not call registry goes only toward enrolling consumers and that all 45 million consumers will enroll via a toll-free telephone number, the FTC's forecasted cost per enrollee is approximately 11 cents. The TRA contends that the cost only of the toll-free calls for 45 million consumers to call to register on the FTC's national registry will far exceed this projected 11 cents cost per enrollee and will more likely approach Tennessee's \$1.00 per enrollee. The TRA predicts that a national do not call program will cost much more than the FTC is projecting and that the revenues proposed are not likely to sustain the program costs, especially during the first two years of operation.

The TRA does support the FTC's stated policy that the cost of the national do not call program, if adopted, should be funded by fees collected from telemarketing companies and not the consumer. In this way, the FTC's proposed funding plan replicates the Tennessee funding plan. Nevertheless, the TRA questions the FTC's plan to waive fees for telemarketing companies that only desire to access five or fewer area codes and basing a fee structure upon the number of area codes a telemarketer wishes to solicit within. A flat fee structure may be a more stable funding source and easier to administer. The TRA urges the FTC to rethink its funding mechanism and come up with an adequate funding source, as required in the *Independent Offices Appropriations Act of 1952, codified at 31 U.S.C. 9701*.

³ Tennessee registered 75% of its current enrollees during the first year of operations. 75% of 60 million is 45 million.

The FTC's proposed funding mechanism will adversely impact successful state do not call programs.

The heart of any government program is its funding source. It is appropriate that adequate funding be established when new government programs are initiated. To take away a government's funding source for a program is to sentence the program to die. States have responded to the public call for protection against unwanted telephone solicitations and have established programs with adequate funding sources. The FTC should exercise caution in devising its funding mechanism for its national do not call program so as not to impact the state's ability to properly fund their programs.

Tennessee presently requires that all telemarketers soliciting Tennesseans to register with the TRA to obtain the state's do not call registry. Telemarketers pay the TRA a registration fee of either \$500 or \$1,000 per year for unlimited access to the state registry. The monies collected from these user-fees, along with the fines associated with violations of the state law, adequately fund the program. Any unintentional action by the FTC that would cause telemarketers to bypass Tennessee registration and only register for the federal register would have a devastating fiscal impact on the Tennessee program. For example, assuming the proposed FTC funding mechanism is adopted, a Tennessee telemarketing company presently registered in the state and paying \$500 per year may be able to obtain a similar list from the FTC for a charge of \$12. Circumvention of state law would be encouraged by such a mechanism. The FTC must develop a funding mechanism for its national registry that will compliment rather than choke successful state do not call programs. The FTC should not allow the effect of unintended

consequences to impair state programs by providing a motivation for telemarketers to forgo state registration.

An alternative federal funding mechanism.

As stated above, the TRA supports the concept of requiring the cost causer to fund the national do not call program, if one is established. The cost causers in this matter are telemarketing companies and not consumers. Requiring telemarketing companies to defer the cost of a do not call program is working in Tennessee and will work on the national level, if designed properly. The TRA asserts that a funding mechanism for a national program can be designed that would compliment states' efforts to protect their citizens from unwanted telemarketing calls.

The first exercise is to forecast the likely cost of the program and determine an appropriate funding source that compliments states' efforts. As stated above, the TRA questions the FTC's projection of the initial operating cost of the national program. Nevertheless, the FTC's proposed funding mechanism needs only some fine-tuning to compliment effective state programs. No reinventing of the wheel is necessary, only proper alignment is required to ensure that all the tires roll properly.

The FTC can avoid harm to state programs at the time when a telemarketer submits an application for access to the national registry. The proposed rules outline information that telemarketers will be required to submit prior to obtaining access to the national registry. One such piece of information is the identification of the area codes that the telemarketer is planning to canvas. The TRA suggest that the FTC require telemarketers applying for the national registry for area codes within a state to show proof that they are properly registered in those states that have do not call programs. This

requirement would cover all telemarketers requesting any or all of the six (6) area codes within, for example, Tennessee. After showing proof of certification, such as a state certification number, the FTC could then electronically contact the state for verification. By taking this step, a cooperative bond would be established between the States and the federal government to protect consumers from unwanted telemarketing calls.

Other issues

Question number 7 in the NPR requests comments on whether it is appropriate to waive fees to telemarketers wishing to only gain access to five or fewer area codes. The TRA asserts that all telemarketers gaining access to the national registry should be required to pay a fee. The area or population served by five or fewer area codes could be enormous. Tennessee has only six (6) area codes. This exception would allow a telemarketer to obtain millions of telephone numbers without assisting to defer the cost of the national program. Tennessee's program assesses all providers a flat fee.

Conclusion

As stated in its earlier comments in NPR R411001, the TRA understands that operational and enforcement issues between the jurisdictions may arise, if the FTC initiates a national do not call program. The resolution of such issues may require the combined efforts of the states and the FTC. The creation of a Federal-State Board could serve as a body to work out these issues.

Respectfully Submitted,

K. David Waddell, Executive Secretary
Tennessee Regulatory Authority

June 28, 2002

TENNESSEE REGULATORY AUTHORITY



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TENNESSEE REGULATORY AUTHORITY

Sara Kyle, Chairman
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October 3, 2002

The Honorable Fred Thompson
511 Dirksen Senate Office Bldg.
Washington, DC 20510

Fax Number: 202-228-3679

Dear Senator Thompson:

We would like to bring to your attention a matter that is being initiated by the Federal Trade Commission ("FTC") that could adversely impact Tennessee. We would respectfully request that you encourage the FTC to work cooperatively with our agency to find a workable solution in the true spirit of federalism and prevent the unnecessary federal encroachment on our state's successful Do Not Call Program.

As you are aware, the Tennessee General Assembly enacted the Tennessee Do Not Call Program in 1999 and delegated implementation and enforcement of the Tennessee Program to the Tennessee Regulatory Authority ("TRA"). The General Assembly designed this legislation to relegate the cost of the Tennessee Program on the cost causers, or the telemarketers rather than the consumers. Under the Tennessee Program, telemarketers pay a registration fee of \$500 per year which allow them unlimited access to the Do Not Call Registry. This funding formula allows Tennessee citizens to sign up for the Tennessee Program at no cost. All of the financial support for the Tennessee Program is generated from telemarketer registration fees and enforcement fines with no funds coming from the state general fund. Our state's legislative leaders designed one of the most successful state Do Not Call programs in the nation, as evidenced by citizen participation and satisfaction.

The success of the Tennessee Program has not only gained the acceptance of our citizens, but has also garnered the attention of the national press and of other states implementing Do Not Call programs. To date, approximately 780,000 Tennessee homes have registered with the Tennessee Program. Also, an Internet-based random survey conducted by our agency of citizens on the Tennessee Program indicate that 96% of those surveyed responded that telemarketing calls have either significantly dropped (74%) or moderately dropped (22%). Due to our vigorous enforcement actions and the desire of telemarketers to obtain our state Do Not Call Registry, telemarketers have registered with the Tennessee Program. Approximately 600 telemarketers have registered with the TRA, which has provided adequate funding for the Tennessee Program.

Anything that the FTC would do in its proposed rulemaking to reduce the number of telemarketers registering with our state could diminish the effectiveness of the Tennessee Program by drying up the funding source.

We have participated in the FTC's rulemaking by filing written comments on two separate occasions raising our concerns. In addition, our staff has had discussions with the FTC staff. In all our previous discussions, we have offered a possible solution, but it does not appear that the FTC listened. While the FTC's proposed rule does not directly preempt the Tennessee Program, we believe the net effect of the rule could be devastating to all state programs including Tennessee's by weakening the effectiveness of our state law and providing less protection to our citizens. Specifically, we believe the FTC's rule could: 1) greatly reduce the Tennessee Program's revenue source; 2) give telemarketers an incentive for bypassing state registration requirements; 3) make the registration process for consumers more difficult and costly; 4) weaken the protections for consumers that are now in place under state law; and 5) increase the difficulty for consumers in registering complaints.

Under the proposed FTC rules, a telemarketer will be able to get the Tennessee Do Not Call Registry from the FTC, for less than \$50 per year compared to the state fee of \$500 per year. What incentive will telemarketers have to register with the state and pay the fee? The FTC will still look to the states to lead in the investigation of consumer complaints and enforcement of its proposed rule, according to FTC staff. They have indicated that states will have to come up with another revenue source to fund state Do Not Call programs. We have proposed a simple solution. We have suggested, assuming adoption of its proposed rule, that the FTC not provide telemarketing companies with the Tennessee Do Not Call Registry, in whole or in part, unless they can provide evidence that they are registered with the state. The FTC staff balked at this idea.


Sensing no compromise, and fearful of the public reaction to the federal encroachment of a popular state consumer protection program, we turn to you for assistance. We ask that you encourage the FTC to work with the states that have Do Not Call Programs already in place. We do not believe our solution is unreasonable. Our preference is to "grandfather" state programs and exempt those states from the proposed rules. If our solution is not accepted, we believe, at a minimum, the FTC should recognize that some states have spent large amounts of funds to implement Do Not Call Programs and may still have financial commitments over the next several years and agree to provide a reasonable time period for states to phase out state registries and find other revenue sources to fund state Do Not Call programs. We believe a three (3) year grace period is the minimum time that would be needed in Tennessee for the transition. Please understand we are proposing the latter solution only as a last step.

The voice of the public for Do Not Call Programs has found its way into the halls of state legislatures and throughout the country as a high profile political issue. Many states have tackled abusive telemarketing practices and have implemented successful Do Not Call

programs. Being closer to the situation and in response to public sentiment, twenty-six (26) state legislatures have passed Do Not Call statutes as of August 2002, and similar legislation is pending in other states.

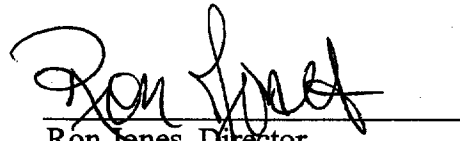
Tennessee has an outstanding program and we believe such consumer protection is best provided closest to the people. Please help us to protect state law and save the Tennessee Do Not Call Program.

Respectfully Submitted,


Sara Kyle, Chairman


Deborah Taylor Tate, Director


Pat Miller, Director


Ron Jones, Director